

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0007, Samuel Zannini, Jr. v. Town of Atkinson, the court on January 20, 2006, issued the following order:

The appellant, Samuel Zannini, Jr., appeals an order of the superior court upholding the denial of his administrative appeal by the Town of Atkinson Zoning Board of Adjustment (ZBA) and remanding to the ZBA for further review his request for a variance. We affirm and remand.

We will uphold the superior court's decision unless it is unsupported by the evidence or legally erroneous. Boccia v. City of Portsmouth, 151 N.H. 85, 89 (2004). The superior court shall not set aside or vacate the ZBA's decision except for errors of law, unless the court is persuaded by the balance of the probabilities, on the evidence before it, that the decision is unreasonable. Id. All findings of the ZBA upon all questions of fact properly before the court shall be prima facie lawful and reasonable. RSA 677:6 (1996).

In this case, the trial court found that the appellant's predecessor in interest had a vested right, but that the predecessor and the appellant abandoned that vested right to maintain the subject property as two separate and distinct lots. No party challenges the trial court's finding of a vested right. The appellant argues, however, that the record demonstrates that the ZBA did not reach or otherwise consider the issues of abandonment. The transcript of the hearing before the superior court reveals that the appellant specifically represented to the court that the ZBA had considered the issue of abandonment. Having represented to the trial court that the issue had been considered by the ZBA, the appellant cannot now argue that the trial court erred in considering this issue because the ZBA had not previously done so. Cf. Webster v. Town of Candia, 146 N.H. 430, 445 (2001).

The trial court's finding of abandonment is supported by the evidence in the certified record. While the subject property was once maintained as two lots, the trial court found that the property had been taxed as one lot since 1982, and that the appellant's predecessor in title had benefited from this tax treatment. The deed conveying the land to the appellant provided further evidence that his predecessor had abandoned any development right that he may have once possessed; in his deed, the predecessor indicated that although the land had once been two lots, at the time of the conveyance to the appellant, it was one. Accordingly, we find no error in the trial court's ruling. See Lawlor v. Town of Salem, 116 N.H. 61, 63 (1976) (decisive test of whether right has been abandoned is whether circumstances surrounding use of land indicate an intent to abandon the right).

The requirements for a variance are statutory in origin. See RSA 674:33, I(b) (1996). To obtain a variance, a petitioner must show: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) the variance will not diminish the value of surrounding properties. Id.

As the trial court noted, the ZBA originally considered the appellant's request for a variance prior to our ruling in Boccia v. City of Portsmouth, 151 N.H. 85 (2004). We therefore affirm that portion of the trial court's order that remanded the case to the ZBA for consideration of the variance request under the hardship standards set forth in Boccia. We express no opinion on the merits of the application.

Given our conclusion, any other issues raised on appeal require no further discussion.

Affirmed and remanded.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**